

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

**Before: Ms. Annapurna Gupta, Accountant Member
And Shri TR Senthil Kumar, Judicial Member**

**ITA No. 329/Ahd/2020
Assessment Year 2011-12**

The ITO Ward-1(2)(1), Ahmedabad (Appellant)	Vs	Ashif Mehbobelahi Rushnawala 10, Jalaram Estate Nr. Railway Crossing Sarkhej Sarkhej Ahmedabad382210 PAN: AATPR0611F (Respondent)
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**Appellant by : Shri V.K. Singh, Sr. D.R.
Respondent by : Shri S L Poddar, A.R.**

Date of hearing : 13-06-2022
Date of pronouncement : 22-06-2022

आदेश/ORDER

PER : ANNAPURNA GUPTA, ACCOUNTANT MEMBER:-

The present appeal has been filed by the Revenue against the order passed by the Commissioner of Income Tax (Appeals)-10, Ahmedabad, (in short referred to as CIT(A)), dated 21-02-2020, u/s. 250(6) of the Income Tax Act, 1961(hereinafter referred to as the "Act") pertaining to Assessment Year (A.Y) 2011-12 confirming the levy of penalty u/s. 271(1)(c) of the Act.

2. The Registry has marked the appeal as delayed by 43 days since it was to be filed by April 2020 but was filed on 15th June 2020. We have however noted that due to the pandemic of Covid-19, the limitation prescribed for filing appeals was extended till further orders' by the Hon'ble Supreme Court vide its order dated 23/03/2020 in Suo Moto Writ Petition (Civil) No.(s) 3/2020. And the same was ultimately extended upto 28th February 2022 in M.A No.21 of 2022 dated 10th January 2022. Therefore, there is no delay as such in the filing of the appeal.

3. As transpires from the orders of the authorities below, penalty u/s 271(1)(c) of the Act, for concealment/furnishing inaccurate particulars of income was levied on the assessee amounting to Rs.2,92,210/- being 100% of the tax sought to be evaded on account of disallowance of claim of exemption u/s 54F of the Act made in assessment amounting to Rs.28,36,982/-. The same was deleted in appeal by the Ld.CIT(A) . Hence the present appeal before us by the assessee raising the following grounds :

(1) The Id. CIT(A) has erred in law and on the facts & in circumstances of the case by deleting the penalty of Rs.2,92,210/- levied u/s.271(l)(c) of the Act, 1961 for concealment of income even though the case falls under exception clauses envisaged in CBDJ Circular No. 03/2018, relevant excerpts of which read as under:- "where Revenue Audit Objection has been accepted by the Department".

(2) It is, therefore, prayed that the order of Id. CIT(A) may be set aside and that of the Assessing Officer be restored.

4. During the course of hearing before us, at the outset itself it was noted from the orders of the authorities below that there was a glaring legal infirmity in the order passed levying penalty u/s 271(1)(c) of the Act. It

was noted that the penalty proceedings were conducted and penalty subsequently levied on a charge totally different to that on which it was initiated. To put it otherwise, the initiation of penalty proceedings was not as per law, since there was no satisfaction of the Assessing Officer regarding the assessee having concealed/furnished inaccurate particulars of income on account of the addition/disallowance on which penalty was ultimately levied. The penalty proceedings were conducted and penalty levied without the mandatorily required satisfaction of the AO that the assessee had concealed/furnished inaccurate particulars of income on account of the addition/disallowance made in the assessment order passed.

5. In the facts of the present case, the Assessing Officer(AO) , we have noted from the assessment order passed dated 23-11-2015 ,had initiated penalty proceedings on account of the assessee having wrongly claimed capital gains , earned by it on a transaction of sale of property, as long term capital gains and thereafter having claimed exemption of the same u/s. 54F of the Act by investing the long term capital gains in a residential house, when, as per the AO the long term capital gain had in fact been claimed on a depreciable business asset, and was therefore in the nature of short term capital gain as per section 50 of the Act and the assessee was not therefore entitled to exemption u/s. 54F of the Act which was allowed as per law only on long term capital gains. The relevant portion of the order is as under:

“Therefore, considering the facts of the case, the sale consideration received on account of sale of godown is to be treated as Short Term capital Gain in view of provisions of sec.50 of the IT. Act and therefore, no claim of reduction of indexed cost of acquisition as well as claim of exemption u/s.54F shall be available.

I, therefore, add Rs.30,00,000/- to the total income of the assessee under the head "Short Term Capital Gain" being the amount of sale consideration received on account of sale of godown treating it as business assets in view of the above discussion and no indexed cost of acquisition as well as claim of exemption u/s.54F is allowed and therefore, withdrawn. Since the assessee has furnished inaccurate particulars of his income and thereby concealed the particulars of his income, therefore, penalty proceedings u/s.271(l)(c) of the IT, Act is hereby initiated separately.”

6. But subsequently in appellate proceedings, the Id. CIT(A) held that the assessee was entitled to exemption u/s. 54F of the Act, taking the view that the deeming fiction created u/s. 50 of the Act, with respect to depreciable assets being treated as short term capital gains, would be confined for the purposes of mode of computation of capital gain contained in Section 48 & 49 of the Act and would not cover the claim of exemption u/s. 54F of the Act. Accordingly, the Id. CIT(A) directed the Assessing officer to verify the claim of the assessee for deduction u/s. 54F of the Act and if the conditions were found fulfilled he directed the AO to allow the same to the assessee. The findings of the Ld.CIT(A) to this effect find mention in the order of the AO dated 16-02-2017 giving effect to the CIT(A)'s order at para 2 as under:

2. The Learned CIT(A)-10, Ahmedabad Vide order No. CIT(A)-10/ITO.WD/1(2)(1)/354/15-16 dated 24.10.2016, has held that the assessee is entitled for an exemption u/s 54 F of the IT Act, taking the view that the deeming fiction created u/s. 50 of the Act with respect to depreciable assets would be

confined for the purpose of mode of computation of capital gains contained in Section 48 and 49 of the Act and would not cover the exemption u/s. 54F of the Act. Accordingly the Ld. CIT(A) has directed the Assessing Officer to verify the claim of the assessee for deduction u/s 54F and if conditions as per section 64F are being fulfilled by the assessee, the deduction is to be allowed u/s 54F.

7. That subsequently, in the order of the AO giving effect to the order of the Id. CIT(A), the A.O. denied the claim of deduction u/s. 54F noting that the assessee did not fulfill the conditions mentioned in Section 54F for the following reason:

(a) that the assessee had booked under- construction property, whose construction had started more than two years before the date of sale of original assets and also most of the payments for the same had been made before the date of the sale of original assets, while as per Section 54F, the assessee could have started the construction only after the sale of the asset.

(b) that the assessee had not deposited the amount not utilized for construction of the new asset in the capital gain account scheme before the date of furnishing of return of income u/s. 139(1) of the Act as per the provisions of Section 54F of the Act.

(c) that the assessee had claimed deduction u/s. 54F of the Act on account of purchase / construction of two residential house properties which is not allowable .

8. The satisfaction for initiation of penalty proceedings was initiated by the A.O. in the original order passed wherein he had made addition of the

entire consideration received as short term capital gain and denied u/s. 54F to the assessee. In the order giving effect to the Ld. CIT(A) wherein he found that the assessee was not eligible to claim exemption u/s. 54F, no satisfaction for initiation of penalty was recorded. However the A.O. proceeded/ went ahead with the penalty proceedings on the basis of the satisfaction recorded in his initial assessment order.

9. Clearly what emerges from the above is that while the Assessing Officer had recorded satisfaction of the assessee having furnished inaccurate particulars of income /concealed particulars of income with regard to returning short term capital gain earned by it as long term capital gains and thereafter incorrectly claiming exemption u/s. 54F of the Act, the proceedings for levy of penalty were conducted on account of the assessee having been found ineligible to claim exemption u/s. 54F of the Act since it failed to fulfil the conditions specified therein. Thus penalty proceedings were conducted and penalty levied on a charge totally different from the charge on which it was initiated.

10. Penalty proceedings being quasi criminal proceedings, the charge in relation to which the assessee is being subjected to levy of penalty has to be clear and all proceedings have to be conducted on the basis of that charge only. It cannot be the case where the proceedings are initiated on account of one charge but conducted and levied on account of a totally different charge. The entire proceedings therefore for levy of penalty are illegal and against all tenets of law.

11. This glaring illegality in the penalty order passed in the present case was pointed out to the Ld. DR during the course of hearing before us.

12. The Ld.DR though was unable to controvert the facts as noted above, he however contended that no grounds were raised by the assessee in this regard before us and therefore this aspect could not be considered for adjudicating the appeal.

13. We have considered the contention of the Ld.DR before us. We are not convinced with the same. A glaring illegality in the proceedings conducted by the Revenue authorities which comes to the notice of the bench cannot be allowed to subsist merely for the reason that the assessee did not point out the same. A patently illegal order cannot be allowed to survive for this reason. The contention of the Ld.DR is therefore dismissed. And considering our findings as above, that the penalty proceedings were conducted and penalty levied for a charge totally different from that for which the penalty was initiated, we have no hesitation in holding that the order passed was not in accordance with law. The penalty order passed is therefore set aside as illegal.

14. Even otherwise and without prejudice to what we have stated above, we find that the Ld. CIT(A) has rightly deleted the levy of penalty noting that the assessee had furnished all particulars with respect to the claim of exemption u/s. 54F and the denial of claim under law cannot lead to the

levy of penalty. The Id. CIT(A) at Para 7 of the order had noted main arguments of the assessee against the levy of penalty as under:

7. The only effective ground is against the penalty of Rs. 2,92,210/- levied by the AO u/s 271(1)(c) of the Act. Before this office, the appellant has filed submissions vide his letter dated 19-8-2019 and 14-2-2020. The main argument of appellant are as under:

1. It is a known fact that in India it takes more than 3 years to complete the construction of property. It is completely out of control of the appellant that construction is completed. Once the payment is made it proves his bonafide to invest in property.

2. The agreement for purchase of property could not be executed because the construction was not complete.

3. That penalty is levied in respect of income which has been adjudicated by CIT(A) in his favour.

4. That notice for penalty and order levying penalty are not digitally signed.

5. That registration of document is not mandatory for claiming deduction under section 54 of the Act and placed reliance on the decision of Hon'ble Delhi High Court in the case of Balraj vs CIT [2002] 123 Taxman290.

6. That commencement of construction is not material and placed reliance on the decision of Karnataka High Court in the case of CIT vs J R Subhramany Bhat [1996]28Taxman 578.

7. That he has not filed appeal on quantum as he was under tremendous mental stress because his wife was suffering from cancer.

8. That he has not furnished any inaccurate particulars of income, only dispute is regarding interpretation of section 54F.

15. The findings of the Ld.CIT(A) deleting the penalty levied taking note of the submissions of the assessee as above at Para 8 of his order as under:

8. I have gone through the submissions of appellant. The appellant has made a case that he was under bonafide belief that he would be able to make entire investment within two year from the date of sale deed but if because of some reason the construction is not completed or deed is not signed then he is not liable for furnishing inaccurate particulars of income. On the issue of Capital Gain account scheme also conflicting view has been taken by Madras High Court in the case of Venkata Dilip Kumar, Kartha-HUF vs. CIT (Madras High Court) W.P. No. 16249 of 2018 dated 05.11.2019 as under:

"Section 54(2) cannot be read in isolation and on the other hand, application of Section 54(2) should take place only when the assessee failed to satisfy the requirement under Section 54(1), While the

compliance of requirement under Section 54(1) is mandatory and if complied, has to be construed as substantial compliance to grant the benefit of deduction, the compliance of requirement under Section 54(2) could be treated only as directory in nature. If the assessee with the material details and particulars satisfies that the amount for which deduction is sought for under Section 54 is utilised either for purchasing or constructing the residential house in India within the time prescribed under Section 54(1), the deduction is bound to be granted without reference to Section 54(2), which compliance in my considered view, would come into operation only in the event of failure on the part of the assessee to comply with the requirement under Section 54(1). Mere non compliance of a procedural requirement under Section 54(2) itself cannot stand in the way of the assessee in getting the benefit under Section 54, if he is, otherwise, in a position to satisfy that the mandatory requirement under Section 54 (1) is fully complied with within the time limit prescribed therein."

In the given circumstances the explanation given by the appellant is bonafide. Accordingly, I delete the penalty of Rs. 2,92,210/- levied by the Assessing Officer.

16. As is evident from a perusal of the above, the Ld.CIT(A) deleted the penalty levied on the disallowance of exemption u/s 54F of the Act noting that the assessee had furnished all particulars relating to the claim of exemption by way of investment in residential properties, that the claim was made under the boanfide belief that all investment would be made within the period specified but could not be done so for reasons beyond his control as the construction was not completed in time and noting that on the requirement of investment in capital gains account scheme there was a judgment of the Hon'ble Karnataka high court holding the requirement to be merely procedural and directory in nature. The Ld.CIT(A) accordingly deleted the penalty on the ground that all particulars with respect to the claim having been truly furnished ,mere disallowance of claim in law would not tantamount to charging the assessee with

concealing/furnishing inaccurate particulars of income so as to levy penalty u/s 271(1)(c) of the Act.

17. We are entirely in agreement with the findings of the Ld. CIT(A) in this regard and find no infirmity in the same.

18. In view of the above, the order passed by the A.O. is set aside and the order of the Ld.CIT(A) deleting penalty levied amounting to Rs.2,92,210/-upheld.

19. In effect, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 22-06-2022

Sd/-
(TR SENTHIL KUMAR)
JUDICIAL MEMBER True Copy
Ahmedabad : Dated 22/06/2022

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order